Joint Academic Opinion
Re: Copyright Amendment Bill (B-13D of 2017), Presented before the Western Cape Provincial Parliament, February 2023

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Introduction

We welcome the call for comments published by the Western Cape Provincial Parliament Standing Committee on Finance, Economic Opportunities and Tourism in February 2023 and offer the enclosed Joint Academic Opinion on the Copyright Amendment Bill [B13D-2017].

This Opinion builds on our previous two Opinions which were submitted to the National Assembly Portfolio Committee on Trade, Industry and Competition. Those Opinions have been published and can be accessed at: Beiter, K. D., Fiil-Flynn , S. M., Forere , M., Klaaren, J., Ncube, C., Nwauche, E., Rens, A., Samtani, S., & Schonwetter, T. (2022). Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B 2017] Potchefstroom Electronic Law Journal, 25, pp 1 – 45 <https://doi.org/10.17159/1727-3781/2022/v25i0a13880>.

Our sustained engagement with the law-making process in the National Assembly led to many of our recommended changes being effected in the current Bill. In this Opinion, we focus only on those few sections of the Bill that we believe require additional changes to meet the concerns we raise below. We submit that the sections that we do not comment on in this Opinion are defensible policy choices of the legislature and conform to established international and comparative copyright law and practice, and should be retained in their current form.

For example, we submit that the provisions regulating collecting societies bring South Africa in line with international practice and should be retained as is.[1] At present, there is *no* comprehensive legislation governing the activities of the collecting societies on behalf of their members.[2] Through ss 22B-22F, the Bill gives effect to judicial[3] and executive[4] recommendations to ensure that authors, composers, performers, and copyright owners remain in charge of, and actively control, the collective management of their copyright and related rights, and consequently actually receive fair remuneration for their creative work.[5]

As we described in our previous Opinions, and as recently held by the Constitutional Court in reference to people with disabilities,[6] the prevailing apartheid-era Copyright Act 98 of 1978

[1] For instance, Kenya Copyright Act, 12 of 2001 (as amended), Chapter VII and the Copyright (Collective Management) Regulations, 2020 Legal Notice No. 178, Kenya Gazette Supplement No. 161, 11 September 2020; Nigeria Copyright (Collective Management Organisations) Regulations, 2007 promulgated pursuant to Copyright Act, Chapter C28, Laws of the Federation of Nigeria 2004; Canada Copyright Act (R.S.C., 1985, c. C-42). As of December 2022, Singapore launched public consultation on subsidiary legislation on Regulation of Collective Management Organisations available at: <https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-draft-regulations-for-cmos/>.

[2] The current regulations only cover the music industry. See, Regulations on the Establishment of Collecting Societies in the Music Industry, GN 517 in GG 28894 of 1 June 2006.

[3] *Shapiro v South African Recording Rights Association Limited*, unreported case no 14698/04 (6 November 2009).

[4] Department of Trade and Industry, Copyright Review Commission Report, 2011, pp3-6 available at: <https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf>

[5] DO Oriakhogba, *Copyright, Collective Management Organisations, and Competition in Africa: Regulatory Perspectives from Nigeria, South Africa and Kenya* (Cape Town: JUTA, 2021).

[6] *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 ("*Blind SA CC*").

("the Copyright Act" or "the Act") violates the Bill of Rights in several respects. We submit that the Copyright Act:

- unfairly discriminates against persons living with visual and print disabilities as it does not permit the creation of accessible formats of works under copyright without permission from the rights holder, in violation of the right to equality and non-discrimination, under section 9 of the Constitution;[7]
- does not permit uses of works to the degree required for freedom of expression, in violation of the right to receive and impart information, under section 16 of the Constitution;
- inhibits access to educational materials in the modern world, including through the digital environment, in violation of the equal right to basic and further education for all, including in languages of the students' choice, under section 29 of the Constitution;
- does not allow for materials to be translated into underserved languages, in violation of the rights to use languages of one's choice and to participate in cultural life, under sections 30 and 31 of the Constitution; and
- does not adequately protect the rights of authors, performers[8], and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work, under section 10 of the Constitution.

The Copyright Amendment Bill promotes the Constitution and the Bill of Rights by amending the deficient Copyright Act with provisions modelled on examples that exist in other open and democratic societies.[9] In particular, the Bill amends the Copyright Act to provide for uses to promote access by people with disabilities, to permit "fair use" to enhance freedom of expression and other purposes, to permit educational uses, including by increasing the ability to fairly use materials that are excessively priced in one of the most unequal countries in the world, to permit translation of materials into South African languages, and to require fair royalties to authors and creators so that they may have a decent standard of living.

In our submission, we are mindful of the constitutional imperative that all organs of State must respect, protect, promote and fulfil the rights in the Bill of Rights.[10] This extends to Parliament's law-making function across all subject matter, including copyright. At the same time, we understand that the Bill of Rights is not absolute and that Parliament may limit rights through a law of general application under certain conditions. Where Parliament exercises its discretion to legislate to limit rights, it must ensure that these limitations are reasonable and justifiable in an open and democratic society and can thus pass constitutional muster.[11] We submit that this

[7] The Constitutional Court suspended the declaration of constitutional invalidity and read in a court-crafted remedy (s 13A) to rectify this unconstitutionality in the interim period. The Court provided Parliament with a period of two years, beginning 21 September 2022, to legislate in this manner. Once Parliament has done so, Parliament's remedy will permanently substitute for the Court's interim remedy. See *Blind SA CC* order.

[8] The Performer's Protection Act 11 of 1967 is the primary regulatory framework for performers' rights. Parliament has recognised that this Act also requires amendments as it does not adequately protect the rights of performers to fair remuneration and fair contractual terms. Parliament is currently engaged in a process of amendment by the Performer's Protection Amendment Bill [B24D-2016]. Our submissions are confined to the Copyright Amendment Bill.

[9] See, for instance, CAB, ss 12A-D, 19C, 19D.

[10] Constitution of South Africa, 1996, ss 7(2), 8(1).

[11] Constitution, s 36(1).

approach - one that considers the impact of statutory copyright on the Bill of Rights - has been correctly taken by the National Assembly and that, considered as a whole, an appropriate balance has been struck between users and creators in the Act as the Bill proposes to amend it. We adopt the same approach in our submissions that follow.

Request to Participate in Oral Hearing

We would like to indicate our interest in presenting oral submissions before the Committee on the issues we set out below and on any other issues that the Committee deems useful.

COPYRIGHT AMENDMENT BILL [B13D-2017]

PROVISIONS RELATED TO PEOPLE WITH DISABILITIES

Clause 22, CAB

Section 19D(1)

We propose that, in order to avoid any interpretation that could lead to its unconstitutionality, s 19D be amended to comply with the Constitutional Court's judgement in *Blind SA v Minister of Trade, Industry and Competition.*[12] The first sentence of s 19D(1) was interpreted by the Court to require regulations
for its operationalisation.[13] This was one of the reasons that the Court did not read-in s 19D(1) as an interim remedy and instead crafted its own interim remedy, s 13A,[14] that applied with immediate effect. The Court held that "immediate redress"[15] was required to rectify the unconstitutionality of the Copyright Act. The Court recognised that further delays would exacerbate the unfair discrimination experienced by people with visual and print disabilities,[16] and that the appropriate remedy was one that "avoids the need for government authorisation".[17]

Recommendation

Delete the phrase "as may be prescribed and" from s 19D(1).

Amended clause

The amended clause would read as follows: s 19D(1) ''Any person who serves persons with disabilities, including an authorised entity [...]".

[12] *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 ("Blind SA CC").
[13] *Blind SA CC* [102], [108], [109].
[14] *Blind SA CC* [112], order para 6.
[15] *Blind SA CC* [102].
[16] *Blind SA CC* [66], [102].
[17] *Blind SA CC* [109].

Section 19D(2)(a)

Section 19D(2)(a) restricts the scope of its application to those activities that are a result of the operation of s 19D(1). This means that persons with disabilities are permitted to only use accessible format copies made under s 19D(1). Since s 19D(1) relates to persons serving persons with disabilities and authorised entities only, this excludes the possibility of a blind person already having lawful access to a work (say, through an e-library) and converting it to an accessible format on their own; or already having lawful access to a work that is in an accessible format and needing to lawfully share such copies, say for educational purposes. This creates limitations on the actual practice of making and sharing accessible format works within the disability community and runs the risk of perpetuating further unfair discrimination. The lawfulness of sharing and using accessible format copies is already covered by the definition of copyright infringement under s 23(2) of the Act as well as the internal limitations of s 19D(2) as relating solely to facilitating access for persons with disabilities.

Recommendation

Delete the phrase "as a result of an activity under subsection (1)".

Amended clause

The amended clause would read as follows: s 19D(2)(a) "A person to whom the work is communicated by wire or wireless means may, without the authorisation of the owner of the copyright work [...]".

Section 19D as a whole

We propose, to avoid further litigation on the grounds of unfair disability discrimination, that the scope of s 19D remains extended to persons with disabilities across the spectrum. The Constitutional Court, in *Blind SA*, understood its mandate as limited to visual disabilities on the basis that the affidavits and evidence before it related to the discrimination experienced by people with visual and print disabilities.[18] By law, courts are limited in their interpretation to the case and issues presented by parties to the suit before them. Hence the Court crafted s 13A which only addressed people with visual and print disabilities. However, the purport of the CAB is to address *all* forms of disabilities, therefore s 19D is drafted more broadly. Parliament's role is broader than the Court's in this regard, and must consider the analogous impact of copyright on all people with disabilities across the spectrum.[19] We submit that this is required by the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") to which South Africa is a party and bears obligations.[20]

[18] *Blind SA CC* [104].

[19] World Intellectual Property Organisation report, prepared by B E Reid and C B Ncube, 'Revised scoping study on access to copyright protected works by persons with disabilities' SCCR/38/3 (2019) available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf>.

[20] UNCRPD, art 30(3) that states that ' States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.'

Recommendation

To pass s 19D, with the suggested changes listed above, and to retain its scope as catering for all forms of disabilities.

Amended clause

None needed.

Clause 31, CAB

Section 28P(2)

We propose that s 28P(2) be deleted as it replicates the requirement of authorisation by the copyright owner that renders accessible format shifting near impossible. This requirement was considered by the Constitutional Court as the key obstacle to accessible format shifting and the basis for the unfair discrimination ruling.[21] Moreover, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("Marrakesh VIP Treaty") requires that where contracting parties decide to provide protection against circumvention of technological protection measures ("TPMs") in their laws, this protection must not prevent accessible format shifting in any way, whether in the law or in its effect.[22] Given that Parliament's stated objective has been to legislate to enable ratification of the Marrakesh VIP Treaty, we submit that Parliament must take note of this mandatory obligation to "safeguard the rights of print disabled persons against the uses of TPMs that interfere with Marrakesh VIP Treaty rights".[23] Such an exception to facilitate circumvention of TPMs for people with disabilities is common practice, reflected in the EU Infosoc Directive[24] as well as the regulations implementing the US Digital Millennium Copyright Act ("DMCA") by the US Library of Congress.[25] Should Parliament retain this provision, it would roll back the effect of the Constitutional Court judgement, leading to further discriminatory outcomes for people with disabilities.

Recommendation

Delete s 28P(2).[26]

Amended clause

None needed as this is a recommended deletion.

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[21] *Blind SA CC* [67].

[22] Marrakesh VIP Treaty, art 7.

[23] LR Helfer, MK Land, RL Okediji, JH Reichman, World Blind Union Guide to the Marrakesh VIP Treaty (Oxford University Press, 2017) 150. See also, at 153, the statement that, "An express legislative or administrative exemption best achieves the object and purpose of the Marrakesh VIP Treaty in general, and of Articles 4 and 7 [of the Marrakesh VIP Treaty] in particular."

[24] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, paras 51–52.

[25] Exemptions to Prohibition against Circumvention, 37 C.F.R. § 201.40(b)(2) (2015).

[26] Our recommendation will result in s 28P(1) reading similar to the New Zealand Copyright Act 1994, s 226E(1) that states "Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act."

PROVISIONS RELATED TO FAIR USE

Clause 13, CAB

Section 12A(a)(i)

Section 12A(a) adds an open, general exception that can authorise use of a work if that use is "fair" according to a four part balancing test similar to that specified in many fair use and fair dealing countries.[27] The exception is "open" to potentially any purpose by inclusion of the words "such as" before the list of exemplary purposes. The openness of the exception permits courts to balance the rights of authors with those of users as required by fundamental human rights and as permitted by the so-called "three step test" in international law.[28] This openness makes the exception "future-proof" in that it can apply to fair uses that are not immediately conceivable by the legislature. Open general exceptions exist in many laws around the world, including open fair dealing countries like Malaysia, countries following the "fair use" formulation,[29] and countries that use the three step test as an enabling general exception, such as Thailand.

The key value of the openness of the exception is its ability to adapt to new uses over time. Such flexibility limits the need for frequent legislative intervention in the future. The value of the example purposes is to increase clarity and predictability. To this end, we recommend that the example purposes include "information analysis" as do recent copyright amendments in many countries.[30] The issue here is that new research methodologies allow computers to help researchers read and analyse information, including in copyrighted works such as books, articles and web pages.[31] These "text and data mining" methods are "used in many machine learning, digital humanities, and social science applications, addressing some of the world's greatest scientific and societal challenges, from predicting and tracking COVID-19 to battling hate speech and disinformation."[32] The current proposed fair use exception should be sufficient to authorise text and data mining methodologies. However, to give researchers a clearer signal, an explicit reference to information analysis (or computational analysis) research methods could be added to the list of presumptively authorised purposes.

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[27] For examples, see J Band and J Gerafi, Fair Use/Fair Dealing Handbook (May 7, 2013) available at SSRN: <https://ssrn.com/abstract=2333863>.
[28] See C Geiger, DJ Gervais and M Senftleben, "The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law" (November 18, 2013) American University International Law Review, Vol. 29, No. 3 (2014), pp. 581-626, available at SSRN: <https://ssrn.com/abstract=2356619>.
[29] N Elkin-Koren and NW Netanel, "Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition" (2020) Joint PIJIP/TLS Research Paper Series 50 available at: <https://digitalcommons.wcl.american.edu/research/50>.
[30] See, for a scoping study and a list of countries that have included such an exception in their laws, World Intellectual Property Organisation report prepared by Guilda Rostama, 'Scoping Study on the Impact of the Digital Environment on Copyright Legislation adopted between 2006 And 2016' SCCR/35/4 (2017) available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_4.pdf>.
[31] See Sean Fiil Flynn et al, *Legal reform to enhance global text and data mining research Outdated copyright laws around the world hinder research,* SCIENCE Vol 378, Issue 6623 pp. 951-953 (Dec 2022) available at <https://www.science.org/doi/10.1126/science.add6124>.
[32] Id.

Recommendation

Retain the section in its current form, and after "research", add the phrase ", including informational analysis".

Amended clause

The amended clause would read as follows: '(i) Research, including informational analysis, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device [...].'

PROVISIONS RELATED TO TECHNOLOGICAL PROTECTION MEASURES

Clause 29 and 31, CAB

Sections 27(5B) and 28O

We propose that ss 27(5B) and 28O be replaced by civil liability provisions. Section 27(5B) criminalises the use, provision, and possession of technologies on the basis that these technologies could be used to circumvent technical protection measures and then infringe copyright. The WIPO Copyright Treaty ("WCT") states that countries "shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors [...] and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law."[33] The WCT does not require *criminal* penalties and permits circumvention for uses authorised by exceptions and limitations.

Leading jurisdictions prefer *civil* remedies for circumvention[34] and civil remedies are also a common consequence for copyright infringement under our current Copyright Act.[35] When circumvention includes technological acts that are criminal in nature, such acts are already extensively dealt with in dedicated cybercrime legislation.[36] If Parliament elects to criminalise circumvention of TPMs as part of copyright law, the Bill should clearly indicate that the requisite criminal intent is required.[37]

Recommendation

Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures.[38] This requires that ss 27(5B) and 28O be

[33] WIPO Copyright Treaty, art 11. The requirements of the WIPO Performers and Phonograms Treaty in respect of technological protection measures is the equivalent to that in the WIPO Copyright Treaty.
[34] See Canada Copyright Act (R.S.C., 1985, c. C-42), s 41 (treating circumvention as an infringement of copyright subject to an interdict or damages).
[35] See Copyright Act, s 24.
[36] Cybercrimes Act 19 of 2020, Chapter 2.
[37] To accomplish this we recommend: insert "intentionally" before "circumvents" in S27(5B)(c); Insert "intentionally" before "circumvent" in S28O(4); Delete "has reason to believe" in S28O(1) and (2)(b); Insert "to their knowledge" before "such" in S28O(2)(a).
[38] We leave open the question of whether criminal liability is an effective/appropriate deterrent to copyright infringement in the rest of the CAB and the Act.

deleted from the Bill and replaced by a provision deeming circumvention and trafficking in anti-circumvention devices to be an infringement of copyright.

Amended clause

Delete ss 27(5B) and 28O and insert in its place:
"Section 23A
Subject to s 28P any person who, at a time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—
(a) intentionally circumvents that effective technological protection measure in order to infringe copyright when that person is not authorized to do so; or
(b) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service and knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure; or
(c) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure when they know that the service will, or is likely to be used, by that other person to infringe copyright in the work;[39]
is deemed to have infringed copyright in the work which infringement is actionable under s 24."

Section 28P(1)

The wording of s 28P(1) is too narrow to achieve its objective. We propose a minor amendment to rectify this. Technological protection measures can prevent people including people with disabilities, learners and artists from engaging in lawful uses of works permitted by the Act. Section 27(5B) seeks to impose criminal liability for engaging in uses that Parliament expressly authorises subject to certain exceptions. Section 28P(1) is intended to permit these lawful uses, however its language refers only to exceptions. But not every lawful use is in the form of an exception. Sections 12C and 12D are not labelled as exceptions and may be better termed limitations. The memorandum to the Bill, preamble to the Bill and s 19D(2) refer to both limitations and exceptions. Lawful uses include those permitted by regulation and statutory licences such as those in Schedule 2. To avoid a lack of clarity whether a lawful use is technically an exception or not, all lawful uses should be included.

Recommendation

Extend the ambit of the clause to every lawful use but retain the reference to exceptions to ensure clarity.

Amended clause

Insert the words "by law", resulting in the amended clause reading as follows: "(a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or [...]".

[39] The prohibition on publishing information that might enable circumvention in ss 27(5B)(c) and 28O(3) infringes the right to receive and impart information in s 16(1)(c) of the Bill of Rights and is unlikely to survive a constitutional challenge. An equivalent provision is omitted from the recommendation.